Supreme Court, U.S.
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No. 99-420

IN THE
Supreme Court of the United States

MIDWEST MOTOR EXPRESS, INC.,
MME, INC., MIDNITE EXPRESS, INC.,
and EXPRESS CARTAGE, INC.,
Petitioners,

v.

CENTRAL STATES SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

THOMAS C. NYHAN *
General Counsel
JAMES P. CONDON
9377 W. Higgins Road
P.O. Box 5123
Rosemont, Illinois 60018-5123
(847) 518-9800
Attorney for Respondent Central States, Southeast and Southwest Areas Pension Fund

* Counsel of Record

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Seventh Circuit's holding that an alleged jurisdictional defect in a complaint (*i.e.*, lack of ripeness) may be cured by an amended pleading should be reviewed or disturbed by this Court?

2. In light of the fact that the Arbitrator and the Courts below found that (i) Midwest Motor Express, Inc. ("Midwest") had failed to show any specific amount of "retroactive" liability (in a constitutionally meaningful sense) imposed upon it by the Multiemployer Pension Plan Amendment Act ("MPPAA"), and (ii) that Midwest had at least some control over the factors that resulted in the liability it faced under MPPAA, should this Court again scrutinize the validity of MPPAA under the Fifth Amendment of the U.S. Constitution—an issue which this Court took up in both *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211 (1986) and *Concrete Pipe v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993)?

3. Whether in this case this Court should attempt to resolve any issue concerning an alleged violation of the *ex post facto* clause of Article I, Section 9 of the U.S. Constitution, given that Midwest did not raise the *ex post facto* issue in the courts below, and Midwest could not, in any event, specify or quantify any retroactive impact of MPPAA?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Midwest's Withdrawal From The Pension Fund.

Central States is a multiemployer pension plan and is subject to joint union and employer administration, as required by Section 301 of the Labor Management Relations Act of 1947. During the period in question, Central States had four employer-appointed Trustees and four union-appointed Trustees. Midwest Petition Appendix ("Midwest App."), p. 3a.

Central States collects contributions from the participating employers as provided in their collective bargaining

agreements entered with local unions or affiliates of the International Brotherhood of Teamsters. Midwest App., p. 3a. The amounts so collected are pooled and used for the benefit of all Fund participants. *Id.* Central States pays benefits to participants and their beneficiaries under the terms of the plan, based upon their years and months of credited or covered employment. Midwest App., p. 53a.

Midwest is a North Dakota corporation. Midwest App., p. 2a. The other defendants are trades or businesses under common control with Midwest and are therefore jointly and severally liable for any withdrawal liability incurred by Midwest. 29 U.S.C. § 1301(b)(1).

Midwest began contributing to Central States on behalf of its union employees pursuant to a collective bargaining agreement in 1958. Midwest App., p. 3a. Midwest continued to contribute continuously to Central States pursuant to a series of collective bargaining agreements covering successive three-year periods ending in 1991. *Id.*

Until the end of 1990, Midwest belonged to an association of trucking industry employers known as Regional Carriers, Inc. ("RCI"). Midwest App., p. 3a. This association was formed for purposes of conducting multi-employer bargaining with the union. Up until 1991, RCI had agreed on behalf of Midwest (along with other trucking industry employers) to the wage and employee benefit provisions of the various National Master Freight Agreements. Midwest App., pp. 53a-54a.

Midwest's last collective bargaining agreement with the union expired on March 31, 1991. Midwest App., p. 54a. Midwest then freely and of its own accord withdrew from RCI for the express purpose of negotiating as a single employer with the union concerning the contract for 1991-94. Midwest App., pp. 53a-54a.

In early August, 1991 Midwest presented the union with a new contract offer. Midwest App., p. 54a. *Under this offer Midwest proposed that it withdraw from Central States and substitute a company "401(k)" pension plan. Id.* Midwest also proposed wage concessions. *Id.* In response to this proposal, on August 12, 1991, Midwest's union employees went on strike, never to return. *Id.* After August 12, 1991, Midwest ceased to have any obligation to contribute to the Central States, and its contributions never resumed thereafter. Midwest App., pp. 54a-56a.

As early as October 1991 Midwest's hired permanent replacements for some of the strikers. Midwest App., 54a.

In May 1992, the union agreed to accept wage concessions proposed by Midwest. Midwest App., p. 55a. However, as part of this package of wage concessions, the union proposed that upon returning to work, the strikers displace the replacements hired by Midwest. *Id.* Midwest would not agree to this term. The negotiations stalled on this point through the remainder of 1992 and 1993. *Id.*

On April 15, 1994, the replacement workers whom Midwest had hired during the strike voted to decertify the union. Midwest App., p. 22a. At that point, the strike ended, and Midwest's cessation of pension contributions to Central States became permanent. Midwest App., pp. 55a-56a.

On April 26, 1994, Central States issued a "notice and demand" of withdrawal liability to Midwest, pursuant to the Multiemployer Pension Plan Amendment Act of 1980 ("MPPAA"), 29 U.S.C. § 1381 *et seq.* This notice of assessment was in the principal amount of $2,546,439.30 and included a demand for payment. Midwest App., p. 56a. Under MPPAA, Central States is authorized (and indeed required) to collect a pro-rata share of its "unfunded

vested benefits" ("UVBs") from employers who permanently cease their obligation to contribute to Central States, *i.e.*, "withdraw" from Central States. UVBs represent the shortfall between the present value of a pension plan's assets and the present value of the vested pension benefits it is obligated to pay.

B. Decisions Impacting Central States UVBs and Midwest's Involvement in Those Decisions.

In this case Arbitrator Malcolm Pritzer found, contrary to Midwest's contentions, that the increases in pension benefits allowed over the years under the Central States Plan "had not unduly added to [Midwest's] withdrawal liability." Midwest App., pp. 69a-70a.

As Central States' enrolled actuary testified:

> [*T*]*he employer has control over* [*the*] *contribution levels.* Those are negotiated, and the employer has to agree to the contributions that are made to the fund. *And it's the contributions that govern the benefit levels provided to the employees.*

Appendix hereto, p. 2a. In addition, Central States advises the negotiating parties (*i.e.*, labor and management) of any *benefit increases* that would result from any contribution rate increases to which they agree. Appendix hereto, p. 4a.

Under each of Midwest's successive collective bargaining agreements, the company expressly *"ratified"* all actions taken by the Central States Trustees. Midwest App., pp. 42a-43a. By definition, this blanket ratification of action taken by Central States included ratification of pension benefit increases. *Id.*

C. Procedural Background and Rulings Below.

1. Interim Payment Dispute.

On April 29, 1994, Central States sent Midwest a statutory "notice and demand" for payment of the $2,546,439.30 withdrawal liability amount. Midwest App., p. 56a. On that same day, before Midwest's first installment payment of withdrawal liability was due, Central States filed a declaratory judgment action against Midwest in the United States District Court for the Northern District of Illinois. Midwest App., p. 5a. In May 1994—also before Midwest's first withdrawal liability payment was due—Midwest filed its own declaratory judgment action against Central States in the U.S. District Court for North Dakota (where Midwest has its principle place of business). Midwest App., p. 56a.

The North Dakota court transferred the North Dakota action to the Northern District of Illinois; the Eighth Circuit affirmed this transfer decision. *Midwest Motor Express, Inc. v. Central States*, 70 F.3d 1014 (8th Cir. 1995).

In the meantime, Midwest's installment payments of withdrawal liability fell due, but Midwest failed to pay them—as Central States' declaratory judgment action had anticipated. Midwest App., pp. 7a-8a. Central States then amended its complaint to seek a money judgment for the misssed withdrawal liability payments. *Id.* The parties then proceeded to arbitrate the merits of the withdrawal liability dispute.[1]

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[1] Under MPPAA, withdrawal liability disputes are the subject of mandatory arbitration with plenary review of all legal questions by the federal courts. 29 U.S.C. § 1401(a). However, MPPAA also establishes a "pay now, dispute later" rule. 29 U.S.C. § 1401(d). An employer assessed with withdrawal liability must commence payments in accordance with the pension plan's demand while the

2. Arbitration.

In the arbitration, Midwest indicated that it only sought to challenge the withdrawal liability assessment on *constitutional* grounds. Therefore, the arbitrator was only asked to resolve certain factual issues which Midwest believed were relevant to the constitutional challenge. Midwest App., p. 62a. This left resolution of the ultimate constitutional issue to the District Court. After a three day arbitration hearing, the arbitrator (Malcolm Pritzker) made the following findings:

a. No evidence of the amount of liability imposed on Midwest resulting from its pre-ERISA participation. The Arbitrator found that Midwest had first elected to participate in Central States prior to the enactment of the Employee Retirement Income Security Act ("ERISA") in 1974. Midwest App., pp. 65a-66a. However, the arbitrator also found that Midwest had elected to continue its participation in Central States *after* the enactment of ERISA, and did so until its withdrawal from the Pension Fund in 1994. *Id.* Further, the arbitrator concluded that Midwest had failed to offer any evidence showing what portion (if any) of its total withdrawal liability ($2,546,439.30) is attributable to its experience as *pre*-ERISA (*i.e., pre*-1974) employer, as opposed to its post-ERISA experience. *Id.*

b. Midwest did not interfere with the union decertification election. The arbitrator concluded that Midwest had not interfered with the decision of Midwest's employees to decertify the union. Midwest App., pp. 66a-67a. The decertification vote was the *final* event in the chain of circumstances that preceded Midwest's complete and permanent withdrawal from Central States. *Id.*

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parties proceed to arbitrate the merits of the dispute. 29 U.S.C. § 1401(d). If the employer prevails in arbitration, its interim payments to the pension plan are to be refunded with interest. *Id.*

c. Midwest's control over factors impacting its withdrawal liability. The arbitrator concluded that Midwest had at least some control over the factors that produced Central States' UVBs (and hence Midwest's withdrawal liability for a pro-rata share of the UVBs). Midwest App., pp. 69a-70a.

3. District Court Ruling.

Pursuant to 29 U.S.C. § 1401(b)(2), Midwest then took its constitutional challenge to the U.S. District Court for the Northern District of Illinois. In a March 31, 1998 Memorandum Opinion and Order, the District Court (Judge Wayne Andersen) rebuffed Midwest's challenges under the "due process" and "takings" clauses of the Fifth Amendment. The district court noted that MPPAA had previously withstood constitutional scrutiny in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), and *Concrete Pipe v. Construction Laborers Pension Trust Fund*, 508 U.S. 602 (1993). Midwest argued that those cases involved a "facial" challenge under the Fifth Amendment, and that MPPAA was unconstitutional as applied to Midwest's particular circumstances. However, based upon the record and findings in the arbitration, the District Court found that:

a. Midwest failed to show a retroactive impact. In 1974, ERISA already imposed a form of "withdrawal liability" on employers participating in multiemployer pension plans. Midwest App., pp. 41a-42a. Midwest agreed to renew its participation after the enactment of ERISA, and Midwest could not show that any portion of its ultimate withdrawal liability resulted from its *pre*-ERISA participation in Central States. *Id.* In the District Court's view, this circumstance deflated Midwest's claim that it was being subjected to a fundamentally unfair form of *retroactive* liability. *Id.*

b. Midwest had control over the factors leading up to its withdrawal. The District Court noted that although Midwest did not directly participate in the union decertification election held by its employees, Midwest "exercised sufficient control over the chain of events that culminated in the decertification." Midwest App., p. 39a. Midwest's control over these circumstances was evident in the positions it took during its labor negotiations, which precipitated and prolonged the strike. *Id.* In addition, during the strike Midwest hired and retained the replacement employees who participated in the 1994 union decertification election. *Id.*

c. Midwest had control over the factors impacting unfunded vested benefits. The district court concluded that Midwest's participation in the bargaining process by which pension contribution levels were set gave it "sufficient control over the . . . factors affecting Central States' unfunded vested benefit liabilities to satisfy the lenient rational basis test." Midwest App., p. 46a. In addition, in its collective bargaining agreements, Midwest had expressly and repeatedly *ratified* the actions taken by the Central States Board of Trustees in the management of the Pension Fund. Midwest App., pp. 42a-43a.

4. Seventh Circuit Ruling.

Midwest then appealed to the Seventh Circuit. That court affirmed the judgment in favor of Central States. The Seventh Circuit noted that a party challenging the constitutionality of an enactment under the due process clause "must show that a legislature acted in an arbitrary and irrational way." Midwest App., p. 9a, *citing Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Although Midwest persisted in complaining about an allegedly "retroactive" application of the withdrawal liability provisions of ERISA, the Seventh

Circuit observed that under the due process clause, even "retroactive" economic regulation is permitted as long as the legislation has a rational purpose. Midwest App., p. 9a. The Court of Appeals concluded that the imposition of withdrawal liability upon Midwest was "a perfectly reasonable means of securing Congress' legislative goal of protecting the pension benefits of the Central States beneficiaries." Midwest App., p. 12a.

Turning to the issue of whether withdrawal liabiiity violated Midwest's Fifth Amendment right to be protected against a regulatory "taking" of its property, the Seventh Circuit noted that one of the most important factors in the "takings" analysis is to determine whether Midwest's liability was "out of proportion to [its] experience with the plan." Midwest App., p. 14a, *citing Eastern Enterprises v. Apfel,* 118 S.Ct. 2131, 2149 (1998). Here the Court of Appeals noted that unlike the application of the Coal Act, 26 U.S.C. §§ 9701-9722, which a plurality of the Supreme Court found violative of the "takings" clause in *Eastern Enterprises v. Apfel,* MPPAA imposed a liability upon Midwest and other employers which was closely related to their actual participation in an employee benefit plan. On this basis, the Seventh Circuit affirmed the judgment against Midwest. *Id.*

REASONS FOR DENYING THE WRIT

Midwest opens its petition with the argument that the District Court did not have subject matter jurisdiction over Central States' withdrawal liability claim. Midwest contends that subject matter jurisdiction was lacking because Central States sued Midwest *before* the first withdrawal liability payment was due. Midwest ignores the fact that Central States' original complaint included a request for declaratory relief, *i.e.,* for a declaration that Midwest was obliged to comply with the withdrawal lia-

bility payment schedule. Central States was correct in anticipating that Midwest would fail to follow the "pay now, dispute later" rule established by MPPAA. Moreover, Central States *amended* its complaint to state a claim for money damages after the first withdrawal liability payments fell due and Midwest failed to pay. There is no split in the circuits on this question: No federal circuit has diverged from the rule that a jurisdictional defect in an original complaint may be remedied through amendment. Indeed, there is a federal statute (not cited by Midwest) which commands this result. 28 U.S.C. § 1653. Hence there is no need for the Court to review the Seventh Circuit's resolution of the jurisdictional issue raised by Midwest.

The issue raised by Midwest under the due process clause of the Fifth Amendment of the U.S. Constitution is also unworthy of review by this Court. Midwest's due process challenge only presents a rehash of issues concerning the constitutionality of MPPAA which this court considered in *Connolly* and *Concrete Pipe*. Midwest strains to argue that it was subjected to a severe form of "retroactive" (*i.e.*, pre-ERISA) withdrawal liability that was not presented in *Connolly* and *Concrete Pipe*. But as the findings of the Arbitrator and the District Court in this case make clear, Midwest failed to show which portion, if any, of its total withdrawal liability arose from its *pre*-ERISA participation in Central States. This Court's holding in *Concrete Pipe* makes clear that the threshold test for retroactivity with regard to employer withdrawal liability that might be violative of the due process clause is not whether the employer is faced with liability based upon its *pre-MPPAA* (*i.e.*, pre-1980) experience in a multiemployer pension plan, but whether the employer faces that type of liability based upon its *pre-ERISA* (*i.e.*, pre-1974) experience in the plan. *Concrete Pipe*, 508

U.S. at 646. Midwest can make no claim that any truly "retroactive" liability was imposed upon it.

In addition, Midwest's participation in and control over the chain of events that led up to its withdrawal from Central States, and its control over the factors that produced Central States' UVBs (and therefore the withdrawal liability) make this case a poor candidate to test limits of the due process clause. In addition, as this Court noted in *Eastern Enterprises v. Apfel,* 118 U.S. at 2149, under MPPAA (unlike the Coal Act as it was applied to the employer in that case) the amount of an employer's withdrawal liability is closely tied to the employer's actual participation in the affected employee benefit plan. This anchors the rationality of the MPPAA scheme, and Midwest has shown no grounds to distinguish its case from the employers who challenged the rationality of MPPAA under the due process clause in *Connolly* and *Concrete Pipe.*

Midwest's invocation of the *ex post facto* clause is simply misplaced. First, Midwest did not raise the *ex post facto* issue in the courts below. Neither the District Court nor Court of Appeals opinions address this issue, and they were not asked to do so. Moreover, this Court's precedents make clear that the *ex post facto* clause only comes into play in reviewing *criminal* legislation. Finally, as discussed above, Midwest has shown scant grounds to conclude that the liability it faces in this case is in any constitutionally meaningful sense "retroactive." Therefore, even if the Court were inclined to reexamine its traditional analysis of the *ex post facto* clause, this case would not facilitate that process.

ARGUMENT

I. MIDWEST HAS SHOWN NO GROUNDS FOR THIS COURT TO REVIEW THE SEVENTH CIRCUIT'S HOLDING CONCERNING THE ALLEGED "PREMATURITY" OF CENTRAL STATES' ORIGINAL COMPLAINT.

Provided that the underlying dispute presents a federal question, pursuant to 28 U.S.C. § 2201, federal district courts have power to resolve civil actions seeking *declaratory* relief. Central States' initial complaint in this action (filed in the U.S. District Court for the Northern District of Illinois) was filed before Midwest's first withdrawal liability payment was due. However, Central States' initial complaint sought a declaration, pursuant to 28 U.S.C. § 2201, that Midwest was obliged to comply with the withdrawal liability payment schedule. Midwest itself brought a "mirror image" action for declaratory relief in the U.S. District Court in North Dakota. Midwest App., p. 7a. Like Central States, Midwest brought its declaratory judgment action before the first withdrawal liability payment was due. This confirmed that there was an actual, justiciable case or controversy between the parties *prior* to the due date of Midwest's first withdrawal liability payment. This is exactly the type of situation which the declaratory judgment act was intended to address. In short, there was no defect in the federal jurisdictional allegations in Central States' original complaint filed in the Northern District of Illinois.

A consideration of the declaratory nature of the relief originally sought by Central States also puts to rest Midwest's contention that Central States' withdrawal liability claim is at odds with this Court's holding in *Bay Area Laundry & Dry Cleaning Pension Trust v. Ferbar Corporation*, 552 U.S. 192 (1997). Midwest Petition, p. 9. *Bay Area* held that a money judgment claim for withdrawal

liability arises after the employer receives statutory notice of the withdrawal liability claim *and* fails to pay in accordance with the schedule of payments included in the notice. But nothing in *Ferbar* precludes a plan from seeking a *declaration* that the employer is bound to adhere to the payment schedule, even if the first required payment has not yet fallen due. Where there is a case or controversy between the parties concerning their rights and obligations under the payment schedule, it is appropriate to seek declaratory relief.

But even if the original complaint had been defective from the standpoint of federal jurisdiction, any such defect was cured by means of Central States' amended complaint. As we have seen, the amended complaint was filed *after* Midwest had missed its first few withdrawal liability payments; therefore, the amended complaint requested a money judgment for the missed payments. Midwest App., pp. 7a-8a. Pursuant to 28 U.S.C. § 1653, any jurisdictional defects in Central States' original complaint were cured by means of the amended pleading. Therefore, the reasoning and result of the Seventh Circuit with regard to the "jurisdictional" issue raised by Midwest was no different from that which would have been employed and reached by any other Circuit. *See, e.g., Leveraged Leasing Admin. Corp. v. Pacific Corp. Capital, Inc.*, 87 F.3d 44, 47 (2d Cir. 1996); *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 941, n. 2 (6th Cir. 1995). There is simply no reason for this Court to review the Seventh Circuit's analysis of this issue.

But Midwest argues that the Seventh Circuit violated the "relation back" doctrine of Fed.R.Civ.P. 15(c). That is, Midwest says because that under Rule 15(c) the amended complaint had to "relate back" to the date of filing of Central States' original complaint, the *facts* relating to the jurisdictional allegations must be taken as they

existed at the time of the original complaint. Midwest's Petition, pp. 13-14. This is perhaps the most specious argument advanced by Midwest. In commanding "relation back," Rule 15(c) says, "An amendment of a pleading relates back to the *date of* the original pleading. . . ." (emphasis added). This means that the date of the *filing* of the amended complaint shall be deemed the same as the date of filing of the original complaint. Thus, Rule 15(c) protects against the lapse of a statute of limitations, so long as the amended complaint and the original complaint relate to the same "transaction, event or occurrence." Advisory Committee Notes to Fed.R.Civ.P. 15(c). Rule 15(c) does *not* state or in any way require that the underlying substantive dates or facts alleged in an amended complaint must be altered or construed differently than as they actually appear in the amended complaint itself. Midwest has completely misconstrued the meaning and effect of Rule 15(c).

II. THIS COURT SHOULD NOT REVIEW THE SEVENTH CIRCUIT'S ANALYSIS OF THE DUE PROCESS CLAUSE AS APPLIED TO MIDWEST.

The centerpiece of Midwest's argument concerning the due process clause of the Fifth Amendment is Midwest's contention that it has been subjected to a severe form of "retroactive" liability under MPPAA that was not present in *Connolly*, 475 U.S. 211, and *Concrete Pipe*, 508 U.S. 602. By "retroactive" liability, Midwest means liability arising from its experience and participation as a contributing employer in Central States prior to the enactment of MPPAA in 1980.

But in *Concrete Pipe* this Court made clear that the crucial date for determining whether MPPAA has had the type of "retroactive" impact that might raise a constitutional concern is 1974—the date of the enactment of ERISA—and not 1980. In *Concrete Pipe* the Court ob-

served that with the enactment of ERISA in 1974, employers who participated in multiemployer plans already faced a form of "withdrawal liability" that was in many respects similar to that ultimately imposed by MPPAA in 1980. *Concrete Pipe*, 508 U.S. at 646. Although under ERISA, withdrawal liability was generally limited to 30% of the net worth of the employer, "there [was] no reasonable basis to expect that the legislative ceiling would never be lifted." *Id.* Thus, in *Concrete Pipe* the Court concluded that "pension plans had long been subject to federal regulation" and "those who do business in the regulated field cannot object if the legislative scheme is butressed by subsequent amendments [e.g., MPPAA] to achieve the legislative end." *Concrete Pipe*, 508 U.S. at 646 (citations omitted). Therefore, the employer in *Concrete Pipe*—who began participating in a multiemployer pension plan in 1976 (after the enactment of ERISA but before the enactment of MPPAA)—was not found to have been subjected to a form of "retroactive" liability that raised a concern under the due process clause. *Id.*

Midwest is in the same position as the employer in *Concrete Pipe*. Midwest began participating in Central States well before ERISA came into effect in 1974. But Midwest voluntarily renewed its participation thereafter. More important, there are clear findings by the Arbitrator and the District Court in this case that Midwest had failed to establish which portion (if any) of its total withdrawal liability ($2,546,439.30) was attributable to its *pre-ERISA* (pre-1974) participation in Central States. The District Court noted that this failure precluded Midwest from making a credible argument that it faced retroactive liability in any constitutionally meaningful sense. Midwest App., pp. 41a-42a. And, of course, the Seventh Circuit, employing a slightly different rationale, affirmed the District Court.

The record in this case suffers from other infirmities which disable the arguments advanced by Midwest in its Petition. Midwest is struggling to fit its case within the concern expressed by Justice O'Connor in her concurrence in *Connolly*. Justice O'Connor was concerned about a hypothetical employer who incurs a withdrawal from a multiemployer pension plan "as a result of events over which the employer has no control." *Connolly*, 106 S.Ct. at 1030 (emphasis added). But in this case, the record is clear that although Midwest did not directly interfere in the union decertification election which *immediately* precipitated its withdrawal from Central States, Midwest did have control over the "chain of events" that caused and prolonged the strike and led up to the decertification election. Midwest App., p. 39a. This gave Midwest control over the events leading up to its withdrawal from Central States, and removes Midwest from the scope of concern expressed by Justice O'Connor in her *Connolly* concurrence.

However, in *Connolly*, Justice O'Connor also suggested that where employers have "*no* control over the level of benefits provided" under a multiemployer plan, and have "*no say whatsoever* in establishing critical features of the plan that determine the level of benefits," the employer might be able to launch a successful due process challenge to its withdrawal liability. *Connolly*, 106 S.Ct. at 1031 (emphasis added). But as the Seventh Circuit pointed out, the fact pattern in this case does not fall within Justice O'Connor's concern for employers who have "*no* control" over the factors impacting their withdrawal liability. Midwest App., p. 16a. The Arbitrator found that Midwest had at least some control over these factors. Midwest App., pp. 69a-70a. Midwest participated in labor negotiations which set the level of employer contributions to Central States; these contribution levels were, in turn,

conspicuously tied to *benefit* levels. Moreover, Midwest made no effort to quantify the amount of its total withdrawal liability that resulted from factors outside its control as opposed to those over which it did have control.

Midwest is in a particularly poor position to complain that the actions of the Central States Board of Trustees—rather than Midwest's own conduct—resulted in producing UVBs and the resulting imposition of employer withdrawal liability; Midwest repeatedly signed labor agreements which *ratified* the decisions and actions of the Central States Board. Midwest App., pp. 42a-43a.

Finally, Midwest has shown no flaw in the Seventh Circuit's discussion of the manner in which Midwest's withdrawal liability under MPPAA has been closely linked to its actual experience and participation in Central States. Midwest App., pp. 14a-15a. Under MPPAA, each participating employer is assigned a share of the pension plan's UVBs in direct proportion to the extent of the employer's participation in the plan. *Id.* Employers (and others) may disagree that this is the *most* efficient or fair way to address the UVB problem, but it is at least a rational approach and is not fundamentally unfair. The proportionality that MPPAA provides between (i) an employer's experience and participation in a multiemployer benefits plan and (ii) the liability the employer may ultimately face, distinguishes MPPAA from the Coal Act which this Court scrutinized (and struck down in pertinent part) in *Eastern Enterprises v. Apfel.* The plurality opinion in that case noted this distinction between the Coal Act and MPPAA. *Eastern Enterprises,* 118 S.Ct. at 2149.[2]

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[2] Midwest argues that Central States' UVBs have been *reduced* over time (Midwest Petition, p. 25), but it does not deny that a significant portion of the UVBs remains. Nor does Midwest deny that Central States has correctly calculated Midwest's *pro-rata* share of responsibility for payment of the UVBs.

For these reasons, the Seventh Circuit correctly analyzed this case under the due process clause of the Fifth Amendment. This case presents no new issues concerning MPPAA left unresolved by the prior opinions of this Court in *Connolly* and *Concrete Pipe*.

III. MIDWEST HAS WAIVED ANY CHALLENGE TO MPPAA UNDER THE EX POST FACTO CLAUSE, AND MIDWEST HAS FAILED IN ANY EVENT TO SHOW ANY "RETROACTIVE" LIABILITY.

Neither the District Court nor Seventh Circuit opinions in this case discuss or even mention the *ex post facto* clause of Article I, Section 9 of the U.S. Constitution. The courts below had no reason to do so, since Midwest raised no argument concerning the *ex post facto* clause until it filed its Petition for a Writ of Certiorari with this Court. Accordingly, even if this Court were to deem the *ex post facto* issue worthy of review in an appropriate case, this is not such a case. That issue simply was not litigated below. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation.")

Further, because, as discussed above, Midwest has failed to specify and quantify any truly *retroactive* liability imposed upon it by the legislation at issue in this case, this is not an appropriate case to reexamine the historic interpretation of the *ex post facto* clause. As Midwest's argument concerning retroactivity and the *ex post facto* clause in its Petition filed with this Court states:

> In the instant case there is an employer who agreed no later than 1958 to begin participation in a union-management sponsored pension plan . . . *Beginning in 1974*, however, and reaching a culmination in 1980 with the enactment of MPPAA, this world changed in a manner that Midwest did not and could

> not have foreseen. *From a date preceding the enactment of MPPAA [in 1980]*, Midwest would be held responsible retroactively for its pro rata share of the pension plan's underfunding. The retroactivity of this enactment meant that there was no way it could alter its conduct so as to avoid the burdens imposed by the statute

Midwest Petition, p. 28 (emphasis added). The reference to "a date preceding the enactment of MPPAA [in 1980]" is, of course, the date of the enactment of ERISA—1974. Bringing the focus back to 1974 in this way points up the glaring deficiency in Midwest's proof in this case. As we have seen, Midwest failed to show the amount of withdrawal liability which it accrued "beginning in 1974" with the passage of ERISA. *Concrete Pipe*, 508 U.S. at 646, held that the pre-1974 accrual of withdrawal liability is the only withdrawal liability that can legitimately be termed "retroactive" for purposes of a constitutional challenge. Midwest's own discussion of retroactivity (quoted above) seems to concede and confirm this point, but Midwest makes no effort to address its failure to specify any amount of withdrawal liability that resulted from its *pre-1974* experience as a participating employer in Central States.

As Midwest also concedes, a long line of precedent in this Court has held that only *criminal* legislation is subject to scrutiny under the *ex post facto* clause. Midwest Petition, pp. 28-29. Perhaps the Court may wish at some point to reexamine that precedent, but Midwest has presented no compelling reason to do so. More important, Midwest has failed to demonstrate that it has suffered from any truly retroactive impact of the legislation it seeks to strike down under the *ex post facto* clause. Therefore, this case does not present an opportunity for reinterpreting the *ex post facto* clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfuly submitted.

THOMAS C. NYHAN *
General Counsel
JAMES P. CONDON
9377 W. Higgins Road
P.O. Box 5123
Rosemont, Illinois 60018-5123
(847) 518-9800
Attorney for Respondent
Central States, Southeast and
Southwest Areas
Pension Fund

* Counsel of Record

APPENDIX

APPENDIX

Excerpt from Transcript of Proceedings
Before the American Arbitration Association
Dated January 14, 1997

* * * *

[233] Q. And I call your attention to Central States Exhibit 74, a September 24, 1996, letter from you to Mr. Ron Kubalanza, the executive director of Central States.

MR. AITKEN: I'm sorry. What number is that?

MR. CONDON: It's 74, Central States Exhibit 74.

MR. AITKEN: My Exhibit 74, if I'm reading this correctly, is a letter to Ron Carey from Ray Cash, Jerry Cook, Joe Orrie, and Jerry Younger.

THE WITNESS: It's an attachment.

MR. CONDON: Yeah. It's an attachment to that. I'm sorry. It's the first attachment, I think, to that letter.

ARBITRATOR PRITZKER: Okay. Do you have that?

MR. AITKEN: Yes.

ARBITRATOR PRITZKER: Okay.

BY MR. CONDON:

Q. Is that September 24, 1996, letter that you wrote to Nancy Wag—that you, Nancy Wagner, wrote to Ron Kubalanza, the executive director of Central States, your analysis of the requested benefit increase?

A. [By Nancy Wagner, Central States' enrolled actuary] Yes. This is my response to that letter.

Q. And in that letter, did you conclude that in [234] your opinion, "A decision to increase benefits now would jeopardize the security of the benefits already earned and future benefits anticipated to be earned by current plan participants"?

Q. And what was the—and what was the decision of the trustees with respect to this requested benefit increase by the Teamsters?

A. They—I believe that they responded that it was not a prudent thing to do. And they enclosed a copy of my letter to them—or to Mr. Kubalanza stating that, the reasons for that.

Q. Based upon your experience at Central States as the enrolled actuary and your ability to observe the workings of Central States, does a contributing employer have any control over the benefit increases granted at Central States in general?

A. Well, all of the benefit increases are approved by the board of trustees. And there's four employer representatives on the board of trustees and four union.

Q. Is there any other type of control, based upon your experience, that a contributing employer has with respect to benefit increases?

[235] A. Well, certainly with respect to his own group of employees that he's making contributions on, the employer has control over those contribution levels. Those are negotiated, and the employer has to agree to the contributions that are made to the fund. And it's the contributions tha govern the benefit levels provided to his employees.

MR. CONDON: I don't have any further questions.

ARBITRATOR PRITZKER: Okay, Cross-examine.

MR. AITKEN: Five-minute break?

ARBITRATOR PRITZKER: Sure.

(WHEREUPON, a recess was had.)

ARBITRATOR PRITZKER: Okay. Back on the record.

MR. AITKEN: Good morning.

I understand opposing counsel to state that he was introducing Exhibit 71 and—

MR. SHEETZ: 74.

MR. AITKEN: —74 to establish a general pattern of the way that the trustees deal with proposed benefit increases. Is that not true?

MR. CONDON: As part of the general practice.

MR. AITKEN: Okay. I would first like to express my confustion over Exhibits 71 through 74 because as I see it, Exhibit No. 71 is a letter to the four union [236] trustees from Ron Carey. Is that not the case?

MR. CONDON: That is correct.

MR. AITKEN: Okay. Exhibit 72—

MR. CONDON: I don't want to interrupt you, Mr. Aitken, but I wasn't offering 72.

MR. AITKEN: No, I understand.

MR. CONDON: Okay.

* * * *

Q. In your experience, are the employers informed of—can you state whether or not employers are informed of the level of benefit increases that are going to be associated with any contribution rate increases that they agree to?

A. [By Mr. Nelson, Central States' Director of Benefits] By employer, the employer negotiators clearly are informed because that's an issue that's discussed at the bargaining table.

In the '94 and in the '91 National Master Freight Agreements, there was in fact a flyer included with the ballot that went out to the individual members, and that was all reviewed in advance, just saying that if this contract was ratified with the increases specified in the article, these are the benefits that the trustees could possibly provide it.

The problem is in these negotiations, it's almost a simultaneous equation that you've got the dollars; you've got the benefits; you need to get the whole contract ratified. So the benefits are typically not formally adopted by the trustees until subsequent to the negotiations because we don't know if the contract will be ratified.

And I'm speaking for freight because it's the one that's created the new benefits. People that follow freight may just agree to freight or to some other class of benefits.

Q. Is it the usual practice—can you tell me whether or not it's the usual practice at Central States to seek advice from the actuaries with regard to the actuarial impact of any benefit increases?

A. It is—yes, it is the practice at all times to have actuarial advice.

Q. Do you—and who has the ultimate authority to decide about the level of any benefit increases?

A. That would be the trustees' responsibility.

Q. To your knowledge, has the board of trustees ever disregarded any actuarial advice that the actuaries have provided concerning any proposed benefit increases?

A. To my knowledge, they have not.

Q. Now, reaching back in all your—to all your experience in the benefits area, which began in the mid—or 1980s, is it your experience that—can you say whether it's the usual experience at Central States that where the trustees do grant an increase in benefit as a result of increased rates under a newly negotiated National Master Freight Agreement that it is the practice that prior to the time the negotiators execute that agreement, all the negotiators are informed of the level of benefit increases that will be associated with the increase in contribution rates?

A. The information is available.

Q. Okay.

A. You know, whether they're—the fund does not go out and seek out every negotiator, but it's available at the bargaining table.

* * * *